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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 655

WILLIAM JEROME PHYLE, *Petitioner,*

vs.

CLINTON T. DUFFY, Warden of the State Prison at San Quentin, State of California, *Respondent.*

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

After proceedings duly had and taken, William Jerome Phyle was found guilty of first degree murder in the Superior Court of the State of California and on February 20, 1946 he was sentenced to death.

The conviction was affirmed by the Supreme Court of the State of California on August 6, 1946. (*People v. Phyle,* 28 Cal. 2d 671.) Thereafter the sentence of

death was reimposed on August 18, 1946 and the date of execution was set for December 26, 1946.

On December 24, 1946, a jury, after due proceedings, adjudged William Jerome Phyle to be insane and he was committed to the Mendocino State Hospital at Talmage, California. On January 18, 1947 the Superintendent of the Mendocino State Hospital at Talmage, California, certified to the Governor that said William Jerome Phyle had recovered his reason (R. 13); thereafter, and on January 30, 1947 the Governor issued to the Warden of the State Prison at San Quentin his warrant appointing May 2, 1947 as the date for the execution of said William Jerome Phyle. (R. 15.)

On April 30, 1947 (three days prior to the date set for the execution) a petition for a writ of habeas corpus was addressed to the Supreme Court of the State of California seeking a stay of the impending execution on the ground that Phyle was still insane. (R. 1.). The writ issued and the execution was stayed pending the final ruling on the petition. (R. 6.) The return of the Warden of the prison contained the first death warrant (R. 7), the order directing the confinement of Phyle in the State Hospital for the Insane. (R. 12.) This commitment directed that:

> "It is Further Ordered that when said William Jerome Phyle recovers his reason, that the Superintendent of the State Hospital in which he is confined certify that fact to the Governor of the State of California for further proceedings as is required by law." (R. 12.)

The return of the Warden also disclosed a certificate from the Superintendent of the State Hospital for the Insane to the effect that said William Jerome Phyle "is presently sane and in possession of his reason" (R. 13, 14) and the Governor's Warrant dated January 30, 1947 fixing the date of execution as May 2, 1947. (R. 15.)

On November 10, 1947, the Supreme Court of California discharged the writ of habeas corpus (R. 16-28) (30 Advance Cal. Reports 843) and on December 8, 1947 a petition for a rehearing was denied by that Court. (R. 49.)

The execution of Phyle was re-set for March 12, 1948.

Again a last minute stay of execution was sought and obtained from this Court on March 8, 1948, upon the filing of an application for certiorari. A writ of certiorari was issued (R. 49) and the matter is now before this Court.

ARGUMENT.

The question of supervening insanity cannot be urged as a matter of right after the date for execution is fixed. Any and all matters growing out of such a situation are within the control of the Legislature. (24 *C. J. S.* 198.)

> "Under the common law, an inquisition to determine the mental condition of a person convicted of crime and under sentence of death, but who, it was alleged, had become insane since ren-

dition of judgment was under the control of the trial court and that court alone decided when an inquisition was warranted. There was no provision for a jury trial and no appeal would lie from the finding of the court. 4 Blackstone's Commentaries 395; Nobles v. State of Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515; People v. Preston, 345 Ill. 11, 177 N. E. 761; Ex parte Chesser, 93 Fla. 291, 111 So. 720; People v. Eldred, 103 Colo. 334, 86 P. 2d 248.

"This common-law rule stemmed from the authority given in early English history to the sheriff or officer having the prisoner in custody under sentence of death to make an inquisition into his sanity where he had reason to believe that the prisoner had become insane since he had been placed in confinement. The sheriff had authority to call for such assistance as he might see fit to advise with him in the case. No appeal was contemplated and the inquiry was for the purpose of determining the one proposition as to whether the prisoner had become totally bereft of his senses so that he in no way understood why he was imprisoned or the punishment which was about to be meted out to him."

Bingham v. State (Okla. C. C. A.), 169 P. 2d 311, 314.

The Supreme Court of the United States in the case of *Nobles v. State of Georgia,* 168 U. S. 398, at pages 405 and 409, 42 L. Ed. 515 at pages 518 and 519, has followed this rule in a case in which there was a suggestion of the insanity of a prisoner who was about to be sentenced to death. The Court held that the

prisoner in such case was not entitled to a jury finding as to his insanity and that the manner in which the question of his sanity was to be determined was purely a matter of legislative regulation and therefore within the control of the state legislature. The following quotations from this case set forth the rule:

"From these considerations it follows that the only question which we are called upon to determine is whether, after a regular conviction and sentence a suggestion of a then existing insanity is made, it is necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common-law jury trial and even although by the state law full and adequate administrative and quasi-judicial process is created for the purpose of investigating the suggestion. Without analysis of the contention, it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as is its nonexistence at another) it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

* * * * * * *

"It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, *it followed that the manner in which such question should be determined was purely a matter of legislative regulation. It was therefore a subject within the control of the state of Georgia.* Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the 14th Amendment, a state is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best." (Emphasis ours.)

It must be evident therefore that if a prisoner is not entitled in a case such as the present one, to a jury trial to determine his sanity or insanity in the first instance neither is he entitled to a jury on the question of his restoration to sanity.

The Georgia Supreme Court, in the case of *Talley v. Beavers,* 80 S. E. 556, 557, is authority for the proposition that the certificate of the superintendent of a state hospital showing that a prisoner was released as not insane removes any presumption that may have existed as to the condition of the mind of the person on the date when he was adjudged insane

and that he might be re-committed on the judgment previously rendered against him. We quote the pertinent part of the decisions:

"* * * And at the hearing of the application in this case it appears that Talley, the person detained in custody, was discharged from the sanitarium on October 14, 1912, 'as not insane.' This was shown by a certificate signed by the superintendent of the institution. This certificate was admitted in evidence over the objection that there was a higher evidence, and that the fact shown by the certificate was not properly certified; but the objection was overruled, and no exception was taken by the plaintiff in error to this ruling.

"Considering the provisions of the Code section quoted above, *and the certificate of the superintendent of the state sanitarium showing that the prisoner was released 'as not insane,' any presumption that may have existed that the condition of mind of the person on the date when he was adjudged insane was continuing at the time of his rearrest was sufficiently overcome*, even if it was necessary to introduce any evidence at all to show that the discharged inmate of the asylum was not in the same mental condition as that in which he was at the time of his confinement. If the condition of H. W. Talley's mind became so impaired after his conviction of the offenses against the municipal ordinances for which he was tried, convicted, and sentenced that it would be improper to enforce the performance of the sentences, still they could be enforced after his restoration to sanity, and no argument nor citation of authorities is necessary to show this; for

> even capital sentences which are suspended under our statutes in cases where the convict becomes insane after conviction may, upon his restoration to sanity, be executed." (Emphasis ours.)

The Supreme Court of California has had occasion to consider the adequacy of the statutory provisions governing cases in which a prisoner becomes insane after judgment of death. In referring to sections of the code involved in this case the Court said that:

> "Equally adequate statutory provision is made for the complete protection of the rights of the defendant who may become insane after his conviction and sentence."
>
> (*People v. Sloper*, 198 Cal. 601.)

The Court then refers to the fact that when a defendant, under condemnation of death recovers his reason the superintendent of the hospital must certify that fact to the warden who must thereupon issue a warrant and appoint the day of execution. The Court then goes on to say:

> "We must conclude, therefore, that it was the intent of the Legislature to limit the jurisdiction of the trial court in proceedings of this nature, to the making of the orders necessary to carry the judgment into effect."
>
> (*People v. Sloper*, 198 Cal. 601.)

The following quotations from the case of *People v. Superior Court*, 4 Cal. (2d) 136, demonstrates the adequacy of the statutory procedure outlined in *Penal Code* sec. 3704:

"It is important to keep in mind the fact that the procedure prescribed by the Penal Code is entirely distinct from that prescribed by the Code of Civil Procedure and the general and more comprehensive law relating to insane and incompetent persons and their commitment to, confinement in and discharge from State Hospitals.

"* * * After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in the state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is fixed exclusively in the officers of the asylum. * * * The Penal Code does not undertake to deal with such subjects. It prescribes a summary procedure for the determination of the question as to whether the defendant is so far mentally affected as to prevent him from defending himself against the crime with which he is charged. The procedure merely defines the duty of the judge, district attorney, and the sheriff and superintendent of the state hospital, all of whom are officers who either have the custody of the defendant or who are charged with the performance of judicial or executive duties in the prosecution of persons charged with the commission of crime. *The Penal Code undoubtedly prescribes the exclusive manner by which the proceedings shall be set in motion when the defendant is restored to sanity or is not insane.*"

The procedure provided for by sec. 3700, et seq. of the Penal Code of California, found its way into the law of this state at a very early date. Substantially the same procedure was set out in the first *"Criminal Practice Act."* (Stats. of Calif. 1850, p. 312.)

Sec. 505 of this, the earliest criminal practice act, read as follows:

> "If it be found by the inquisition that the defendant is sane the Sheriff shall execute the judgment; but if it be found that he is insane, the Sheriff shall suspend the execution of the judgment until he receive a warrant from the Governor or from the Judge of the District Court of the county, directing the execution of the judgment."

By California Stats. 1851, p. 212, the Legislature adopted the *Criminal Practice Act of 1851* and in sec. 473 thereof it re-enacted the quoted section of the *Criminal Practice Act of 1850.*

When the California Penal Code was adopted in 1872, secs. 473 and 474 of the *Criminal Practice Act of 1851* became sec. 1224 of the *Penal Code* and the section read as follows:

> *"If* it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the Governor or from the Judge of the Court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds

that the defendant is insane, the sheriff must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment."

By California Stats. 1905, p. 699, sec. 1224 of the *Penal Code of California* was amended to read as follows:

"If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution, and transmit a certified copy of the order mentioned in the last section to the governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment."

It will be noted that by the 1905 amendment all reference to the Superior Court was omitted and that the Governor was directed to issue his warrant upon receipt of the certificate of the superintendent of the hospital certifying to the recovery of the prisoner.

What was formerly sec. 1224 of the *Penal Code of California* was repealed in 1941 and re-enacted as sec. 3704 of that code with the addition of the following matter at the end of the section:

"And the warden shall ther upon return the defendant to the state prison pending the execution of the judgment."

The use of the executive arm of the government in such cases is not unusual. In England, when the defense of insanity is established, to the satisfaction of the jury, a verdict is brought in that the defendant is guilty, but insane. The result of this verdict is that the Court orders the accused to be kept in custody as a criminal lunatic *until the King's pleasure is known.* (*Criminal Lunatics Act,* 1883, 46 and 47 Vict., C. 38, sec. 2.)

The *Criminal Lunatics Act of 1884,* 47 and 48 Vict., ch. 64 (see Appendix p. i) parallels the California Statute.

The *American Law Institute* in its official draft of a *Code of Criminal Procedure,* secs. 409 to 412, inclusive (see Appendix p. ii), suggests a procedure to be used under circumstances similar to those in this case which closely parallels the California statute. Under this proposed code the finding of insanity in the first instance and the subsequent recovery of reason of a person under sentence to death is entrusted to a commission of physicians appointed by the Governor of the State and to the final decision of the Governor.

The finding of the restoration to sanity and the consequent execution of the prisoner is entrusted to the Governor of the State without reference to a

Court by statute in thirteen states.[1] In four states the medical officer reports his findings as to recovery to a judge who acts on the certificate of the medical officer.[2] There is no provision for a jury determination or other hearing. The statutory provisions of the several states are set out in the commentaries to the *Official Draft of the Code of Criminal Procedure*, page 1150 (American Institute of Law).

DUE PROCESS OF LAW.

"* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *" (sec. 1, 14th Amend. *Const. U. S.*)

We are not concerned with a deprivation of property.

There is no question of liberty involved here. Phyle was deprived of his liberty by his trial in the State Court which culminated in a conviction for murder. At his trial he was afforded "due process of law." Sane or insane he is not entitled to his liberty.

Is he being deprived of his life without "due process of law"?

His life was declared forfeited in the original trial for murder. The warrant for his execution was issued

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[1]Arizona, California, Idaho, Mississippi, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Utah, Virginia, Wyoming.

[2]Georgia, Nebraska, New Jersey, New York.

in that proceeding. (R. 10.) All that the Governor has done is fix the date for the execution of the warrant. (R. 16.) We repeat—at this trial Phyle was afforded "due process of law." No question has been raised on this score.

The action of the Medical Superintendent of the Mendocino State Hospital and of the Governor of California is not the action which deprives Phyle of his life. These actions only affirm that Phyle is sane. Being sane the law which was temporarily interrupted moves on.

Phyle cannot now complain of lack of "due process" in his criminal trial, therefore he is not being deprived of his life without "due process."

Looking at his complaint logically he is asserting an absurd proposition—

He complains that he has been deprived of his constitutional right to remain insane without due process of law!

This is something new.

The books are full of cases in which individuals have complained of the deprivation of their liberty without due process by reason of an adjudication of insanity.

The death penalty is not being invoked because Phyle is sane—he is to be executed because he was convicted of a brutal murder.

We have pointed out that the restoration proceeding has followed "the law of the land."

From the earliest common law to the present date by tradition and statute the State acting through the executive arm has refused to execute insane persons as a matter of grace. This grace of the sovereign has in modern times been regulated by statute. The *American Law Institute* has compiled the American statutes. *Halsbury* states the English law as follows:

> "If it appears to the Secretary of State, either from a certificate signed by two members of the visiting committee of the prison or otherwise, that a prisoner lying under sentence of death may be insane, he is to appoint two or more medical practitioners to examine the prisoner and report, in writing, upon his sanity, and they, or the majority of them, may certify, in writing, that he is insane.
>
> "A person ceases to be a criminal lunatic (1) if he is remitted to prison by a warrant of the Secretary of State issued upon a certificate from two medical practitioners that he is sane; (2) if he is absolutely discharged by a warrant of the Secretary of State; (3) when the term of penal servitude or imprisonment to which he is subject expires."
>
> 26 *Halsbury's Laws of England*, p. 207.

CONCLUSION.

William Jerome Phyle, on whose behalf the petition in this case has been filed, stands committed on a warrant for his execution. This warrant was issued pursuant to a statutory procedure which has existed in California from the very commencement of the laws of the State. This procedure finds its basis in the common law and is generally perpetuated by statute in England and in this country. The Supreme Court of the United States has held that such a procedure is legal and proper.

The legislative intent is emphatically expressed in sec. 3700 of the *Penal Code of California* as follows:

> "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

All of the rights to which Phyle is entitled have been observed. The Warden of San Quentin has shown himself capable of understanding the functions of his office and has heretofore made suggestion as to the insanity of Phyle. That suggestion was acted upon with the result that Phyle was committed to an insane asylum and later released as restored to sanity. If the warden should believe that Phyle is now insane he could again institute the appropriate proceedings.

We submit that this Court should recognize the intent of the Legislature as expressed in sec. 3700 of

the *Penal Code of California* and dismiss the writ of certiorari.

Dated, San Francisco, California,
April 2, 1948.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

CLARENCE A. LINN,
Deputy Attorney General of the State of California,

Attorneys for Respondent.

(Appendix Follows.)

Appendix

Criminal Lunatics Act, 1884, 47 and 48 Vict., Ch. 64, sec. 2(4), 3.

(4) "In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners, and the said medical practitioners shall forthwith examine such prisoner and inquire as to his insanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane."

"* * * Where it is certified by two legally qualified medical practitioners that a person being a criminal lunatic (not being a person with respect to whom a special verdict has been returned that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a Secretary of State, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison, to be dealt with according to law."

The American Law Institute—Code of Criminal Procedure Official Draft, June 15, 1930, secs. 409-412.

Section 409. *"Execution of sentence of death—who may suspend.* The execution of a sentence of death shall not be suspended or stayed, apart from the stay incident to an appeal, except by the governor."

Section 410. *"Proceedings when person under sentence of death appears to be insane.* If there is reasonable ground to believe that a defendant under sentence of death has become insane since he was sentenced the ..... shall immediately notify the governor thereof who shall suspend execution of the sentence until he issues a warrant for its execution. On suspending sentence the governor shall appoint a commission consisting of two competent disinterested physicians to examine into the defendant's mental condition. The commission so appointed may call and examine witnesses and compel their attendance. The commission shall report its finding to the governor. The physicians constituting the commission shall be allowed such fees as the governor deems reasonable, which fees shall be paid by the state."

Section 411. *"Proceedings if defendant is found sane.* If the governor after receiving the report of the commission provided for in section 410 decides that the defendant is sane, he shall issue a warrant to the ..... directing him to execute the sentence at the time designated in said warrant."

Section 412. *"Proceedings if defendant is found insane—recovery of sanity.* If the governor after receiving the report of the commission provided for in section 410 decides that the defendant is insane he shall take steps to have the defendant committed to the _____. If thereafter the proper officer of such institution is of the opinion that the defendant is sane he shall report this fact to the governor, whereupon the governor shall appoint a commission consisting of two competent disinterested physicians to determine whether the defendant has been restored to sanity. The commission shall have the same powers and be allowed the same fees as are provided for in section 410. If, after the report of the commission, the governor decides that the defendant has been restored to sanity he shall cause the defendant to be returned to the custody of the _____ and shall issue a warrant to the _____ directing him to execute the sentence at a time designated in said warrant."

pp. 6, 7, 8, 9, 10

SUPREME COURT OF THE UNITED STATES

No. 655.—October Term, 1947.

William Jerome Phyle, Petitioner, v. Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 7, 1948.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner is under sentence of death for murder in the first degree imposed by a California superior court and affirmed by the State Supreme Court. 28 Cal. 2d 671, 171 P. 2d 428. The validity of that sentence is not here challenged.[1] But § 1367 of the California Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Thus if petitioner is insane, California law prohibits his execution under the death sentence

[1] The opinion of the State Supreme Court affirming petitioner's sentence shows: Upon arraignment in the Superior Court counsel was appointed for petitioner at his request. His pleas were "Not guilty" and "Not guilty by reason of insanity." Later petitioner informed his counsel that he wished to withdraw these pleas and enter a plea of guilty. The trial judge then examined petitioner at length, satisfied himself that the change of plea was voluntarily entered by petitioner with full knowledge of his legal rights, and then accepted it. Evidence was then taken by the court to determine the degree of the murder and to fix the punishment. Two physicians appointed by the court testified that in their judgment petitioner was sane. Other witnesses testified to the facts of the crime. The murder was committed by petitioner while he was in the act of perpetrating a robbery. During the entire proceedings, so the State Supreme Court found from the record, the appointed counsel participated and represented petitioner "with fidelity and proficiency." *People* v. *Phyle*, 28 Cal. 2d 671, 171 P. 2d 428.

which he received. The legal questions here presented relate to the procedures adopted by California to determine whether petitioner is sane or insane as a matter of fact.

It is petitioner's contention that, though having been pronounced insane in a judicial proceeding after his conviction, and though he in fact is still insane, he is about to be executed because a state doctor, acting under authority of state statutes, has declared him restored to sanity. The doctor reached his determination without notice or hearings, and without any opportunity on petitioner's part to obtain an original court hearing and adjudication of his sanity, or even to obtain a court review of the doctor's conclusion that he is sane. This procedure it is argued constitutes a denial to petitioner of that due process of law guaranteed him by the Fourteenth Amendment.

This contention was urged upon the California Supreme Court in habeas corpus proceedings there instituted. That court entertained and considered the petition, but, with two judges dissenting, denied relief, sustaining the validity of the power of the state's executive agents to follow the prescribed statutory procedures. 30 Cal. 2d 838, 186 P. 2d 134. We granted certiorari because of the serious nature of the due process contentions presented in the petition. 334 U. S. —. Here the California attorney general, while supporting the State Supreme Court's denial of habeas corpus, asserts that California affords petitioner an adequate judicial remedy by way of mandamus, a procedure which has not yet been sought by petitioner.

The California procedure may perhaps be better understood by explaining the application of the controlling California statutes to petitioner's case. While he was in prison awaiting execution of the death sentence a question arose concerning the petitioner's sanity at that

time. Section 3701 of the State Penal Code[2] prescribes that if "there is good reason to believe" that a defendant under sentence of death "has become insane, the warden must call such fact to the attention of the district attorney." It is the district attorney's "duty" immediately to institute proceedings in an appropriate trial court to determine the sanity of the defendant, and the court "must at once" summon a jury of twelve to "hear such inquiry." In petitioner's case this prescribed course was followed, a judicial hearing was held as provided by § 3702,[3] and petitioner was adjudged insane. In accordance with § 3703[4] the court then ordered that petitioner "be taken to a state hospital for the insane and be there kept in safe confinement until his reason is restored." It will be noted that the petitioner obtained a judicial

[2] "3701. Insanity of defendant, how determined. If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry."

[3] "3702. Duty of district attorney upon hearing. The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court."

[4] "3703. Convict found insane. The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

hearing as to sanity only because the warden instituted proceedings after determining that there was "good reason to believe" that the petitioner was insane. Thus, the opportunity for a person under sentence of death to have a hearing before judge and jury on the question of his sanity depends in the first instance solely on the warden.

After adjudication of insanity the petitioner was taken to a state hospital for the insane in compliance with the trial court's order of commitment. In accordance with § 3704 [5] the warden then suspended the death sentence and delivered certified copies of the court's order to the governor and to the medical superintendent of the state hospital to which petitioner was sent. As § 3704 provides, the superintendent was directed that when petitioner "recovers his reason," the superintendent "must certify that fact" to the governor, who is then required to issue to the warden his warrant appointing a day for the execution of the judgment. The warden then returns the defendant to the state prison pending the execution of the judgment. This course was followed with reference to the petitioner. Eighteen days after his admission to the state hospital the medical superintendent certified to the governor that the petitioner

[5] "3704. Convict found sane: Duties of warden. If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

was then sane. He was returned to the custody of the prison warden, and the governor set a new date for his execution.

The medical superintendent's determination of petitioner's sanity was based on his own *ex parte* investigation, no notice or hearings having been afforded petitioner or any person on his behalf. It is thus clear that the California statutory scheme here challenged provides neither an administrative nor a judicial hearing as a prerequisite to a determination that a condemned defendant judicially adjudicated to be insane has been restored to sanity; one man in an *ex parte* investigation decides the question upon which hangs the defendant's life, in the absence of a later request by the prison warden for a judicial hearing on the ground that there is then "reason to believe" the defendant has become insane.

The holding of the State Supreme Court in the habeas corpus proceeding was:

> "There is no authority . . . for the proposition that defendant has a right to habeas corpus or other judicial proceeding to determine the question of his sanity after his release from the state hospital. In fact, section 3700 of the Penal Code[*] expressly prohibits such a proceeding. Once the superintendent certifies that defendant is sane, he is remanded to the custody of the warden for execution and 'No judge, court or other officer other than the Governor' can then suspend the execution of the judgment, 'except the warden of the State Prison to whom he is delivered. . . .'" *In re Phyle*, 30 Cal. 2d at 842–843, 186 P. 2d at 137.

[*] "3700. Governor may suspend. No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

For the statements in its opinion that the due process clause of the Fourteenth Amendment conferred no right on a condemned defendant to any kind of judicial adjudication or review on the question of sanity, the State Supreme Court primarily relied on *Nobles v. Georgia*, 168 U. S. 398. We do not think that either the actual holding or what was said in the opinion in that case would necessarily require a rejection of the contentions made here against the California procedures.

The Georgia law under scrutiny in the *Nobles* case provided that the sanity of a person previously condemned to death should be determined by a tribunal formed in the following manner: "The sheriff of the county, *with the concurrence and assistance of the Ordinary thereof*, (emphasis added) shall summon a jury of twelve men to inquire into such insanity. . . ." If this tribunal found insanity the sheriff was required to suspend execution of sentence and report his action to the presiding judge. Restoration of sanity so as to justify execution was to be determined by the presiding judge "by inquisition or otherwise." Thus "the only question" in the *Nobles* case, as the Court there said, was "whether . . . . in order to constitute due process of law" the question of insanity of a condemned defendant must "be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common law jury trial, and even although by the state law full and adequate administrative and *quasi* judicial process is created for the purpose of investigating the suggestion." P. 405. This agency for a hearing to inquire into the prisoner's sanity, composed as it was of sheriff, county judge and jury, was referred to as an "apt and special tribunal." There is provision in the California statutes for a hearing before a judge and jury when, but only when, the warden is of opinion that there "is reason to believe" a defendant is insane.

The *Nobles* case does stand for the proposition that a condemned defendant has no "absolute right" to a hearing on the question of his sanity on his mere "suggestion." Such an absolute right, this Court thought, would make the punishment of a defendant "depend solely upon his fecundity in making suggestion after suggestion, to be followed by trial after trial." P. 406. For this reason, the Court in the *Nobles* opinion cited and quoted from legal commentators and from judicial opinions which emphasized, as the opinion in the *Nobles* case itself emphasized, the importance of leaving to the "discretion of a judge" the most appropriate procedure for determining the sanity of a defendant already sentenced to death. It was in this connection that the Court made the statement in the *Nobles* case upon which the California Supreme Court particularly relied, that "the manner in which such question should be determined was purely a matter of legislative regulation."

Reading this statement in its context and in relation to the Georgia procedure, we do not understand that the Court in the *Nobles* case passed upon the question here urged: whether a state which bars the execution of insane persons can submit to a single individual this question, crucial to life, to be decided by that individual *ex parte*, with or without notice and hearings as the individual may choose, and without any judicial supervision, control or review whatever. The *Nobles* case we do understand to be an authority for the principle that a condemned defendant cannot automatically block execution by suggestions of insanity, and that a state tribunal, particularly a judge, must be left free to exercise a reasonable discretion in determining whether the facts warrant a full inquiry and hearing upon the sanity of a person sentenced to death.[7]

[7] See cases collected in 49 A. L. R. 804, *et seq.*

What has been said previously indicates the gravity of the questions here raised under the due process clause as heretofore construed by this Court, both the contention that execution of an insane man is offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, *Adamson* v. *California*, 332 U. S. 46; *Carter* v. *Illinois*, 329 U. S. 173, and the different contention that life shall not be taken by a state as the result of the unreviewable *ex parte* determination of a crucial fact made by a single executive officer. See *Ng Fung Ho* v. *White*, 259 U. S. 276.[8] It is not appropriate for us to pass on such constitutional questions in this habeas corpus case if, as the California attorney general contends, there is a state remedy by mandamus available to petitioner under which he can invoke judicial action to compel the warden to initiate judicial proceedings, and in which mandamus proceedings the court will hear and consider evidence to determine whether there is "reason to believe" that the petitioner is insane. *New York ex rel. Whitman* v. *Wilson, Warden*, 318 U. S. 688; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Carter* v. *Illinois*, 329 U. S. 173. See also *Simon* v. *Craft*, 182 U. S. 427, 437.

The State Supreme Court in denying habeas corpus said that the state statutes made "no provision for a judicial determination of the question of the sanity of a defendant delivered to the warden of a state prison for execution except as set forth in § 3701." That is the section which

[8] See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369–370; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, 392; *Duncan* v. *Kahanamoku*, 327 U. S. 304, 322; *Dent* v. *West Virginia*, 129 U. S. 114, 123–124; *Brown* v. *New Jersey*, 175 U. S. 172, 176; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49–54, and concurring opinion, Brandeis, J., at 76–78. *Cf. United States* v. *JuToy*, 198 U. S. 253, 263, *Simon* v. *Craft*, 182 U. S. 427, 436.

requires a judicial inquiry with a court and jury only when and if the warden certifies that "there is good reason to believe" that a person sentenced to death has "become insane." But it does not necessarily follow from the fact that petitioner cannot obtain a full-fledged judicial hearing as to sanity on his own motion made directly to a state court that he is without some other adequate state remedy. And the state attorney general asserts here that the petitioner does have an "ample remedy, if the facts support him, by application to the California courts for a writ of mandamus" to compel the warden to institute proceedings under § 3701.

Thus we have an unequivocal declaration by the state attorney general that petitioner has not attempted to take advantage of an available state remedy. The attorney general is the highest non-judicial officer of California, and is particularly charged with the duty of supervising administration of the criminal laws.[9] His statement on this question is entitled to great weight in the absence of controlling state statutes and court decisions.[10] Nor is there anything in the State Supreme Court's opinion in this case that need be considered in conflict with the attorney general's opinion. While that court held that there was no statutory provision for petitioner to obtain a sanity hearing except through action by the warden as prescribed in § 3701, it did not hold or even consider whether there was judicial power under state law to compel the warden to do his duty under § 3701. It did declare, clearly and emphatically, that the statute imposed a mandatory obligation on the warden to initiate judicial proceedings if there was good reason to believe a con-

[9] California Government Code §§ 12510–12512, 12519, 12550–12553.

[10] See *Union Ins. Co.* v. *Hoge*, 21 How. 35, 66; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *Driscol* v. *Edison Co.*, 307 U. S. 104, 115.

demned defendant insane, an obligation that continued to rest upon the warden even after certification of restoration to sanity by the medical superintendent. The Supreme Court also declared that this duty would continue up to the very time of execution. Failure of the warden to perform this obligation, so the court said, would be a "violation of section 1367," which section prohibits execution of an insane man. In view of this mandatory obligation upon the warden to initiate proceedings if "there is good reason to believe" a defendant sentenced to death is insane, it would be somewhat anomalous, to say the least, if California courts were wholly without power to correct an executive agent's abuse of authority in a matter of such great significance as the execution of insane persons.

The jurisdiction of California courts to issue mandamus has its source in Art. VI, §§ 4, 4b, 5 of the state constitution. The writ can issue to any inferior tribunal or person to compel an act which the law specifically enjoins. Code of Civil Procedure of California, § 1085. It has been held that the writ may issue against the secretary of state, *Hutchinson* v. *Brown*, 122 Cal. 189, 54 P. 738, or even against the governor. *Elliott* v. *Pardee, Governor*, 149 Cal. 516, 520, 86 P. 1087, 1089.

Petitioner contends, however, that mandamus would not be available under California law if there is another adequate remedy, see *Kahn* v. *Smith*, 23 Cal. 2d 12, 142 P. 2d 13, that here habeas corpus is available, and hence mandamus is not. This contention is fully answered by the State Supreme Court's opinion in this case, holding that neither habeas corpus nor any other remedy is available to test sanity of a condemned defendant, except that remedy under § 3701 which only the warden can institute. Hence, so far as it here appears, mandamus to compel action by the warden is the only available remedy.

Petitioner contends that this remedy is inadequate because under California law no relief could be hoped for in a mandamus proceeding without a showing that the warden's non-action was arbitrary and capricious. We cannot know, of course, just what precise standards the State Supreme Court may hold must be met by petitioner in order to obtain the judicial inquiry provided in § 3701. We are persuaded by the attorney general's statements and brief, and by the state constitution, state statutes, and state decisions to which he referred, that mandamus is probably available, and that in a mandamus proceeding some issues of fact concerning petitioner's sanity can be drawn by the parties, resolved by the courts, and provide support for relief. Different language has been used in different opinions concerning the conditions upon which the writ will issue in California. Although it has been said that generally the writ will issue only to correct an abuse of discretion, *Bank of Italy* v. *Johnson*, 200 Cal. 1, 31–33, 251 P. 784, 795–796 and cases cited, it has also been pointed out that in some circumstances writs can issue to compel action in a particular way. *Wood* v. *Strother*, 76 Cal. 545, 549, 18 P. 766, 769; *Landsborough* v. *Kelly*, 1 Cal. 2d 739, 744, 37 P. 2d 93, 95.

In considering what the issues may be in a mandamus proceeding, it must be borne in mind that the warden is under a mandatory duty to initiate judicial proceedings, not *when* a defendant is insane, but when *"there is good reason to believe"* he is insane. We cannot say at this time that California's remedy by mandamus will be less than a substantial equivalent [11] of one which authorized him to apply directly to a court for a full hearing. For this Court held in *Nobles* v. *Georgia*, *supra*, that in the absence of sufficient reasons for holding a

[11] See *Edison Co.* v. *Labor Board*, 305 U. S. 197, 234; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 152–153.

full hearing into the sanity of a defendant sentenced to death, a state judge may deny such a hearing consistently with due process. As previously pointed out, the decision in the *Nobles* case emphasized that due process of law had never necessarily envisioned a full court hearing every time the insanity of a condemned defendant was suggested. Applications for inquiries into sanity made by a defendant sentenced to death, unsupported by facts, and buttressed by no good reasons for believing that the defendant has lost his sanity, cannot, with any appropriate regard for society and for the judicial process, call for the delays in execution incident to full judicial inquiry. And a court can just as satisfactorily determine by mandamus as by direct application whether there are good reasons to have a full-fledged judicial inquiry into a defendant's sanity.

In this situation we find no federal constitutional question presented which is ripe for decision here. So here, as in *Woods* v. *Nierstheimer*, *supra*, being unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground, the writ of certiorari is

Dismissed.

SUPREME COURT OF THE UNITED STATES

No. 655.—October Term, 1947.

William Jerome Phyle, Petitioner, v. Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 7, 1948.]

Mr. Justice Frankfurter, whom Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge join, concurring.

Where life is at stake one cannot be too careful. I's had better be dotted and t's crossed. And so I deem it proper to state my understanding of the opinion of the Court, on the basis of which I concur in it.

We granted certiorari to review a decision of the Supreme Court of California which dismissed *habeas corpus* proceedings brought in that court. We did so on the assumption that the case raised questions under the Fourteenth Amendment—more particularly, whether an unreviewable determination by the superintendent of a State hospital, that one convicted of murder and found to have become insane after conviction had been restored to sanity and therefore was subject to execution, was consistent with the due process which the Fourteenth Amendment secures. The Court now finds that all that the California Supreme Court did was to hold that as a matter of California procedure the petitioner's claim could not be passed on by the direct remedy of *habeas corpus*, but that there is available a special local remedy, labeled mandamus, whereby the petitioner can judicially test his present sanity. In short, the Court dismisses the writ of certiorari because the decision of the court below rests on a purely State ground in that there is a State remedy

available, which has not been pursued, by means of which he can secure the rights he claims under the United States Constitution.

Of course I recognize the weight to be attached to the Attorney General's views regarding the law of California. But the controlling voice on California law is that of the Supreme Court of California. Whatever may be the elegancies of procedure by which the matter is to be determined, our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that State is what our decision presupposes it to be, namely, that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity. This means, of course, not the very restricted scope of relief which is normally associated with the traditional remedy of mandamus. It presupposes that California affords petitioner the means of challenging in a substantial way the *ex parte* finding of the Superintendent of the State Hospital for the Insane and enables him to secure judicial determination of the claims he has made in his petition for *habeas corpus* which, so the Court now holds, is not the proper way to proceed.

Upon this view I concur in the decision and opinion of the Court.